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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

vs.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE NATIONAL ASSOCIATION OF BROADCASTERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

WARNER W. GARDNER
WILLIAM H. DEMPSEY, JR.
RICHARD M. SHARP
734 15th Street, N.W.
Washington, D.C.

DOUGLAS A. ANELLO
General Counsel
National Association of Broadcasters
1812 K Street, N.W.
Washington, D.C.
Attorneys for the National Association of Broadcasters

Of Counsel:
SHEA & GARDNER
734 15th Street, N.W.
Washington, D.C.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of Broadcasters moves this Court under Rules 35 and 42(3) for leave to file a brief *amicus curiae* in this case. Its grounds are:

1. The National Association of Broadcasters ("NAB") is the trade association of the broadcasting industry. Its membership includes 522 television broadcast stations and the three national television networks, as well as over 3,000 radio broadcast stations and the four national radio networks.

2. The interests of the NAB are directed toward the impact of the community antenna television ("CATV") systems upon the television broadcast stations. In some instances, typically any CATV system which does no more

than afford better reception of the local broadcast station, the NAB sees no adverse impact upon the broadcast station itself, whatever may be the impact upon the copyright proprietor. In other instances, typically CATV importation of distant programs into the market area of the local broadcast station, the NAB fears that the survival of many local broadcast stations would be cast in jeopardy and potential UHF stations stifled if CATV systems were free to compete outside the copyright laws.

3. The interests of the NAB are thus allied with those of the respondent in respect of the issues now presented in this case. We suggest, however, that when this case returns for trial of damages and related issues, the trial court may find that any of a number of circumstances minimize any money judgment against petitioner, and that the Copyright Act can on a case by case basis produce a sensible and equitable integration of the CATV system into the broadcast industry. To that extent our position in the practical outcome of many cases might approach, by a markedly different legal theory, something close to the broad "middle-ground" result proposed by the Solicitor General.

4. Counsel for respondent and for petitioner have advised us that neither will oppose grant of this motion.

Respectfully submitted,

WARNER W. GARDNER
WILLIAM H. DEMPSEY, JR.
RICHARD M. SHARP
734 15th Street, N.W.
Washington, D.C.

DOUGLAS A. ANELLO
General Counsel
National Association of Broadcasters
1812 K Street, N.W.
Washington, D.C.
Attorneys for the National Association of Broadcasters

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BRIEF FOR THE NATIONAL ASSOCIATION OF BROADCASTERS, AMICUS CURIAE

QUESTIONS PRESENTED

Petitioner operates two community antenna television ("CATV") systems. Among the programs transmitted by these systems were motion pictures as to which respondent owns copyrights and as to which petitioner sought no license. The questions are:

1. Whether petitioner infringed respondent's exclusive right, under Section 1(c) and 1(d) of the Copyright Act, to "perform" or "reproduce" the motion pictures "in public."

2. Whether petitioner had a license implied in law, either

generally or within the normal service area of the originating broadcast station, to transmit to subscribers for charge copyrighted programs which were broadcast to the public without charge.

3. *Amicus curiae* suggests further that, in deciding these issues, which are alone presented at this interlocutory stage, the Court should recognize that a large variety of factual circumstances surrounding the issue of damages or accounting remain to be proved, and that many could affect the extent of any liability of petitioner to respondent.

This Brief

Our guiding purpose is to avoid duplication of matter presented by the parties. To that end, we adopt respondent's statement of facts and argument on the merits. Our own argument starts with a rather comprehensive description of the television broadcast and CATV industries and closes with an indication of the variety and importance of the issues which have not yet been tried and which we believe can alone define the exact impact of copyright liability on the CATV industry. The intermediate sections offer brief and supplemental comment on the issues which we expect to be more fully developed by the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. *The Broad Issue*

From the beginning of television broadcasting, its regulation has been guided by the fundamental policy determination made by the Congress and by the Commission that the establishment of local broadcast stations should be encouraged. Only in this way could local public service programs and local self-expression be achieved. Because of this policy, hundreds of local stations have been established, many prosperous but many—particularly the UHF stations

—still either losing money or only marginally profitable.

The law of copyright is critically important to the development of local broadcast stations because copyrights are an important means employed to protect a station's exclusivity. "'Exclusivity'—a concept evidently viewed with alarm by petitioner but plainly with favor by both the Congress and the Commission—is central to the health of a broadcast station. Its revenues are obtained from advertisers and are large or small depending upon the size of its viewing audience. The station's appeal to viewers is that it will provide programs that they will like and that they cannot see on another channel. This promise of exclusivity cannot be made unless the seller of the program can, on his part, guarantee territorial exclusivity to the broadcast station.

Program distribution developed quite naturally in accord with the commercial reality that there are many separate television markets and that the value of a program to a broadcaster depends importantly upon the program supplier's promise not to license the program to other stations serving the same market. The program supplier relied in large measure upon the copyright law for the effectiveness of his guarantee of exclusivity. In some cases, as with respondent, the entire program was the subject of a copyright; in others, basic elements of the program were the subject of copyrights held by third persons and the program supplier acquired the necessary licenses to use the material.

Since broadcast stations were unquestionably subject to the strictures of the copyright law, these guarantees of exclusivity were effective. Accordingly, not only have the program suppliers, and through them the copyright holders, been able to protect their property interests, but also the public policy in favor of the establishment and growth of local broadcast stations has been promoted.

The rapid spread of CATV has introduced a wholly new

element into the picture. Whether considered from the perspective of the viewing public, the copyright owner, the program supplier, the broadcast station, or the electronic engineer, CATV is simply another means of distributing television programming, indistinguishable in any material fashion from television broadcast. Unless, therefore, CATV is subject to the same copyright rules as broadcast stations, the integrity of the pre-existing distribution system, with its emphasis upon "exclusivity" as the primary protection for the local station, will be seriously jeopardized by the consequent freedom of CATV systems to shuttle programs from one market to another for public distribution.

In the first years of CATV this threat did not assume dangerous proportions because CATV served largely as a supplement to the local broadcast station, extending its range to homes within its market area which for one reason or another were not receiving an adequate signal. More recently, however, CATV systems have come on a large scale to import into the market areas of local stations programs broadcast by far-distant stations serving a different market. Along with this development there has come the establishment of CATV systems in metropolitan markets. The profits to such CATV systems are substantial and, if the systems are in truth freed of the cost of the programs which they sell, could become startling. This effort of the CATV systems to break out of their local boundaries and to import programs from other markets without regard to the copyright laws must not only seriously damage copyright owners, but will also, by denying to local broadcast stations the exclusive program rights upon which they depend, seriously undermine the public policy in favor of local broadcast stations.

B. *Summary of Argument*

I

The largest part of our argument is devoted to a factual exposition of the television and CATV industries, which does not lend itself to useful summarization.

II

We adopt the relevant portions of respondent's brief and of the memorandum of the Solicitor General discussing the case law and showing that petitioner has "performed" or "reproduced" respondent's copyrighted works "in public."

So far as concerns the policy of the Copyright Act, petitioner's actions in selling and delivering to its subscribers copyrighted programs undermine precisely those interests the Act was designed to protect. Against the will of the copyright proprietor and the broadcast stations to whom exclusive licenses are given, CATV enterprises systematically appropriate copyrighted programs and sell them to their subscribers, many of whom would not otherwise have viewed the programs and who would accordingly have constituted an untouched market for the copyright proprietor. Unless this is prohibited under the Copyright Act, grave harm will be done to the actors, authors, composers, producers, and supporting personnel who depend for their livelihood upon copyright protection, as well as to the broadcast stations whose audiences and revenues are based upon their exclusive program rights. If broadcast stations themselves are not free to expropriate copyrighted material in this fashion, as surely they are not, then neither are CATV systems, which are in essence simply another mode of distribution of television programs.

III

The rules promulgated by the Federal Communications Commission which are under consideration in *United States* v. *Southwestern Cable Co.*, No. 363, and *Midwest Television, Inc.* v. *Southwestern Cable Co.*, No. 428, do not conflict with the decision of the Court of Appeals in this case. The clearest evidence is that the Commission itself has said that there is no conflict and that the Solicitor General has not supported petitioner's position.

On the other hand, affirmance by this Court of the validity of the rules would not obviate the need for subjecting CATV systems to copyright liability. The Commission has said that the rules are not intended to protect the interests of copyright holders or their licensees, and in fact they do not afford such protection except incidentally. Thus, for example, the rules restrain importation by CATV of a distant signal only in certain portions of the largest 100 markets, and even that restraint can be and often has been removed by the Commission. Moreover, some 1500 CATV systems are "grandfathered" under the rules, so that as to those the only inhibition is that they may not duplicate a local station's program by importing a distant signal for showing on the same day. This, as the Commission itself has recognized, provides no significant protection respecting "syndicated" programming which is licensed to stations for broadcast whenever they choose and is rarely broadcast by different stations on the same day. In sum, the rules were designed to promote policies of the Communications Act, not the Copyright Act; and in applying them the Commission looks to the former policies exclusively, not to the latter. Thus, the Commission's statement that copyright should be an independent, and would be a valuable, adjunct to its rules is plainly well grounded.

IV

While we are in full accord with the Solicitor General's analysis of the "performance" issue, in our view his suggestion of a license implied in law for the carriage by CATV systems of signals within the Grade B contour of the originating station is deficient in law and would be impractical in execution. He does not assert that the Copyright Act, as construed by the Court of Appeals, conflicts with the terms or policies of any other statute. His suggestion that the anti-trust laws "be kept in mind" falls far short of a contention that the implied in law theory springs from those laws. Presumably this is why he does not discuss in any detail the character of the broadcasting, CATV, or copyright industries. Nor does he assert that the Communications Act is the source of the implied in law doctrine; and though petitioner relies upon that statute's policy of "free public reception," as petitioner characterizes it, CATV itself hardly qualifies under that policy. In the end, the Solicitor General's reliance upon "practicalities, equities, and other factors" appears to rest on his view that, because of "the economic realities of the broadcasting industry" respecting such matters as advertising practices, his implied in law theory would not unduly decrease the value of copyrighted material. But this amounts simply to a suggestion that the statute be rewritten in a fashion that, as the Solicitor General concedes, does not square with the legislative purpose as reflected in the statutory provisions themselves. That power to rewrite resides only in the Congress.

Moreover, adoption of the implied in law theory for CATV television retransmission would have untoward consequences. It would, for example, seem to be equally applicable to radio retransmission such as that performed by background music systems like "Muzak," as well as to retransmission of television signals by "repeaters" such as satellites, translators, and boosters.

V

Finally, the petitioner's dark predictions about the future of CATV unless the Court of Appeals is reversed are baseless. The mechanical problems of establishing a licensing system would be no more difficult than other problems that have been solved in the past so as to permit the licensing of copyrighted material by its many and varied users. Nor are petitioner's purported fears about astronomical past damages realistic. First, the history of copyright litigation, in general and with particular reference to CATV, is ample evidence that copyright owners are not interested in the destruction of their prospective licensees. Second, petitioner's argument is rooted in the erroneous assumption that the statutory damages of not less than $250 per infringement would automatically govern. Apart from defenses such as laches and estoppel, which are expressly reserved for trial in this case, this Court has made it clear that in copyright cases the courts have a wide discretion among the remedies of actual damages, accounting, and statutory damages, and that they are to be governed by the equities of the case and the policies of the Act. *Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 231, 234 (1952). One of the obviously relevant factors is the degree to which the copyright proprietor has actually been damaged, and this will vary greatly from case to case depending upon the particular facts. In short, the Copyright Act was not designed to require that remorseless retribution be exacted in every case of infringement no matter what the circumstances. Rather, it delegates broad discretion to the trial court. If there is abuse of discretion, the time for correction is later and the place is litigation over that question, not over the threshold issue of infringement.

ARGUMENT

I

The Industries Affected by This Case

The immediate question before the Court is a narrow one: does the CATV system "perform" or "reproduce" a program "in public," as those words are used in the Copyright Act of 1909. It is true that in their electronic functions neither television broadcasting nor CATV transmission bears much resemblance to the common understanding of a "performance." No more do radio broadcasts, motion picture exhibitions, wired music, and many other forms of communication. But the courts have applied the words of the Copyright Act to these new technologies and new industries so that the legislative purpose would be furthered rather than frustrated. *See, e.g., Kalem Co.* v. *Harper Bros.*, 222 U.S. 55 (1911); *Buck* v. *Jewell-LaSalle,* 283 U.S. 191, 196-197 (1931). We undertake, accordingly, a summary description of the technology and the commercial organization of the industries involved in this case.

A. *The Television Industry*

1. *Technology.* The electronic functions of the CATV system are almost indistinguishable from those of a television broadcast station, with the sole exception that the broadcast station transmits its signals through the air and the CATV system through coaxial cable. We do not undertake to summarize the findings of the district court in this case, which contain a very detailed description of television technology (J.A. 40a-59a), but only point their salient teachings.

Television programs originate in (a) a live performance,

(b) a magnetic tape recording which stores for playback the electronic recordations of sight and sound, (c) a motion picture film, or (d) a slide or other static visual material.[1]

The sight and sound of a live performance are used to control a series of electro-magnetic waves, the last of which, shaped so as to permit reconstruction of the original sight and sound, are carried to the broadcast antenna and radiated toward the horizon as electro-magnetic waves.[2]

The process is essentially the same with respect to tape and motion pictures, each of which is used to produce electro-magnetic waves from which the original sight and sound can be reconstructed.[3] While monitor screens are normally used (as is frequently the case with CATV trans-

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[1] See, generally, Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 8, p. 1224 (1965) (hereinafter cited as "House Hearings"); J.A. 40a.

[2] The electronic detail, though still in brief summary of the district court findings, is that the sight of a live performance is recorded by a television camera, which focuses the scene optically on a photosensitive surface containing elements whose electronic characteristics vary according to the intensity of the light which strikes them. When this surface is "scanned" by a narrow electronic beam, moving in a regular sequence, a pattern of electric voltage is created which varies according to the brightness of each part of the picture. The resulting "video signal" has a wave length and frequency not suitable for broadcast. Accordingly, carrier waves of shorter length and higher frequency are produced. These are modulated by the video signal as to amplitude. Simultaneously the "audio signal" is produced by a microphone which, vibrating according to the air pressures produced by sound, produces electric voltage which varies according to the intensity of the sound. The audio signal is amplified and then used to modulate either the same or a simultaneously produced carrier wave as to frequency. The modulated carrier waves are then amplified, and carried to the antenna for broadcast. (J.A. 40a-44a.)

[3] When the tape is run through a tape playback unit it reproduces the same video and audio signals as were derived from the original live performance, which are then used as described in note 2 to modulate the carrier waves, which after amplification are broadcast. Motion pictures and slides are reproduced within a camera tube which is scanned by an electronic beam as is a live performance, while the sound track activates the audio signal. (J.A. 43a.)

mission), neither picture nor sound need be made visible or audible within the studio.

The home television set receives the waves from the broadcast station on its antenna (or from the CATV system by cable); these are used to shape a further series of electro-magnetic waves the last of which produces the picture and sound of the receiving set.[4]

2. *The Broadcast Station.* The policy of the Communications Act is "to make available, so far as possible, to all the people of the United States a rapid, efficient • • • radio communications service" (47 U.S.C. § 151). It directs the Commission to assign bands of frequencies to classes of stations, to assign the frequency and determine the power for each station, to determine station locations, and authorizes it to establish areas or zones to be served by any station (§ 303(c), (d), (h)). Its licenses are to be granted so "as to provide a fair, efficient, and equitable distribution" of service among the states and communities (§ 307(b)).[5]

In discharge of this responsibility, the Commission in 1952 allocated frequency channels to each of about 850 communities in the United States (47 C.F.R. § 73.606). It did so in explicit recognition that the policy of the Act required it to maximize the number of local community broadcast stations, in order to permit local public service programs and local self-expression not available in broad-

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[4] The incoming waves are used to fix the characteristics of another wave produced at a lower frequency. This wave is then demodulated, to produce signals like those originally made by the camera, which control the scan of an electronic beam which produces varying gradations of light on the photosensitive inner surface of the picture tube. The reproduced audio signal simultaneously is converted into sound by activation of the loud speaker. (J.A. 50a.)

[5] See, *e.g.*, *F.C.C.* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 362 (1955).

casts from the major centers. 17 Fed. Reg. 3905, 3912-13 (1952).[6]

There are available for assignment to television broadcast stations 12 very high frequency ("VHF") channels and 70 ultra high frequency ("UHF") channels. Very few additional VHF assignments can be authorized without causing severe interference with the signals of existing stations. The expansion of local commercial and educational television broadcast stations is, therefore, dependent upon use of the UHF channels. UHF faced, however, an almost impossible obstacle in that most receiving sets were able to use only VHF frequencies. The Congress in 1962 accordingly authorized the Commission to require that all receiving sets be equipped to receive UHF as well as VHF signals.[7] One of the major bases of the Commission's concern over the impact of CATV is its fear that it will throttle the continued development of local UHF broadcast stations which had begun to gather momentum after the 1962 legislation.[8]

3. *Service Areas.* Television broadcast is limited in distance to the horizon, with a slight extension due to the

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[6] The Commission's purpose to protect local broadcasting is also effectuated through rules regulating the power and antenna height of broadcast stations and the use of translators and other auxiliary broadcast systems. 47 C.F.R. § 73.614, 689, §§ 74.731-32, 831-32.

[7] 76 Stat. 150, adding 47 U.S.C. §§ 303(s) and 330. The purpose of this unusual legislation was to break the "vicious circle" by which the absence of UHF stations prevented the manufacture of UHF receivers, while the absence of receivers prevented the construction of UHF stations. This was explicitly done in order to stimulate local and educational television broadcast. See H. Rep. No. 1559, p. 5, and S. Rep. No. 1526, p. 5, 87th Cong., 2d Sess.

[8] Second Report and Order, Community Antenna Television Systems, in Docket 15971 *et al*, 2 F.C.C. 2d 724, 31 Fed. Reg. 4540, 4545, 4557-4560 (1966) (hereafter cited as "Second Report").

In 1963 about 7% of TV homes could receive UHF signals, while about 42% could in 1967, according to a U.S. Census Bureau survey as reported in NAB, *1967 Dimensions of Television*, p. 10.

gravitational bending of the electro-magnetic waves. The resulting limitation in the service area of a broadcast station is given rough theoretical definition in the predicted Grade A and Grade B contours estimated under the rules established by the Federal Communications Commission when a station is licensed. These contours are calculated upon a standard assumption as to broadcast station power and antenna height and as to the antenna height and sensitivity of the home receiver, as well as to average terrain and soil conductivity in the area. The Grade A contour marks the boundary where acceptable reception is expected to be available 90 per cent of the time to 70 per cent of the receiver locations. The Grade B contour is the boundary where satisfactory reception is expected to be available to 50 per cent of the receiver locations 90 per cent of the time. (17 Fed. Reg. 3905 (1952)).[9]

The Grade A and B contours have no exact relation to the actual market areas of a television broadcast station. As the Commission recognized in the regulation providing for these contours, "[u]nder actual conditions, the true coverage may vary greatly from these estimates * * *" (47 C.F.R. § 73.684). Again what is an acceptable signal often depends upon the alternative; an indistinct picture may hold its audience if there is no alternative and be ignored if there is a better one available. The clearest example of the irrelevance of the Grade B contours to the market areas of stations is found in the overlapping areas where the broadcast stations of one community have Grade

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[9] In the flat areas of the mid-West, the typical Grade A contour will be 25-30 miles from the broadcast antenna and the Grade B contour 60-75 miles; from Denver both the Grade A and Grade B contours reach only about 1 mile to the mountains in the west and about 60 and 100 miles, respectively, to the east. Television Digest Inc., *Television Factbook, 1967*, pp. 114b, 261b (hereafter cited as "Television Factbook"; the "Service" volume is identified by the letter "a" and the "Station" volume by the letter "b").

A or Grade B contours which include those of another major community. The Washington-Baltimore stations comprise one pair of many such examples; both because of signal clarity and because of local interest, the normal market area of stations in one city does not include homes in the other.[10]

The service area of a broadcast station can be enlarged, in areas where it occasions no interference with other broadcast stations, by the use of "repeater" stations. These can be "booster" stations which retransmit at the same frequency or, more usually, "translators" which retransmit at a different frequency. These stations are low in cost and operated unattended. In addition, there are "satellite" broadcast stations which normally retransmit the signal of a "mother" station but occasionally originate their own programs. Repeater stations, in contrast to cable systems, are not limited by cost to reasonably compact communities nor to those who can afford to subscribe. In 1966, 1,894 translators were in operation.[11] Under Section 325 of the Communications Act, a repeater station cannot rebroadcast without the permission of the station whose signal it retransmits. 47 U.S.C. 325.

4. *Programs and Exclusivity.* Broadcast station programs come from three sources: (a) A network distributes programs, either live or prerecorded, to its affiliated stations usually for simultaneous or, because of time differ-

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[10] Washington is within the Grade A contour of some Baltimore stations and within the Grade B contour of all, and vice versa. *Television Factbook* note 9, pp. 129b-134b, 321b-324b.

Other areas of contour overlap are Boston-Providence, Chicago-Milwaukee, Cleveland-Akron, Toledo-Akron, Toledo-Detroit, Cincinnati-Dayton, Sacramento-San Francisco, Los Angeles-San Diego, Indianapolis-Muncie, Lancaster-Wilkes Barre, Richmond-Norfolk. Hearings on Copyright Law Revision-CATV, before Subcommittee of Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary on S. 1006, 89th Cong., 2d Sess., p. 200 (1966) (hereafter cited as "Senate Hearings").

[11] *FCC Annual Report*, 1966, p. 117.

ences, for same-day broadcast.[12] (b) "Syndicated" programs are licensed by suppliers for individual use and the film or tape is physically distributed for broadcast at a time convenient to the station. (c) Locally originated programs are presented by the station, either live in its studio or from film or tape of a prerecorded performance; the program may be produced by the station or obtained from an outside source.[12a]

The commercial broadcast station derives its principal revenues from advertising. Its advertising rates generally reflect the size of the station's viewing audience within the designated market. This revenue is wholly dependent upon the station's ability to broadcast programs which the home viewer will want to watch. To obtain that audience the station will pay substantial sums, which include copyright fees, for attractive programs.

To maintain audience and revenues, it is indispensable that the broadcast station have the exclusive right over a reasonable period of time to show its program in its service area. This is what the station pays for. It will ordinarily gain fewer viewers for a program which has already and recently been shown. This principle of "exclusivity" has been described by the Federal Communications Commission as "an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment in programs," and as fixing "the fundamental distribution practices which have developed in the * * * industry's competitive program market."[13] It has explained:[14]

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[12] The distribution of programs may be by way of (a) cable or microwave facilities supplied by telephone companies or others; (b) physical distribution of film or tape; or (c) off-the-air reception by nearby stations.

[12a] House Hearings, note 1, p. 1224.

[13] Second Report, note 8, p. 4544; see, also, the explanation of National Association of Broadcasters, Senate Hearings, note 10, p. 111.

[14] Second Report, note 8, p. 4560.

> This exclusivity reflects the judgment that presentation by others of a program such as a feature film within the station's market within some period of time obviously reduces the audience and the value of the program to the station.

The broadcast industry is organized upon this principle. The networks usually limit the broadcast of a program to one station in each community, thus ensuring exclusivity of their programs within the station's market area. When program material is licensed by a station from other sources, the station is given the exclusive right of performance within its market area for a specified period of time. Without that exclusivity, the program would have a greatly reduced value to the broadcast station, with corresponding reduction in the amount it would pay the program supplier and through him the copyright owner.[15]

Each time a program is televised in a market, a portion of the audience potential for the next showing of that program in that market is diminished. Therefore, the fee that stations are willing to pay to license the rights to show "repeats" or "re-runs" usually diminishes with each successive showing in the particular market.[16] Nonetheless, the "re-run" market is an important source of revenue for the more successful programs, and the copyright owners derive substantial amounts from such license fees. Exclusivity is as important for re-runs as for the original showing.[17]

Any interest that the broadcast station might have in expanding its viewing audience into markets other than its own is limited by the fact that the program suppliers

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[15] Senate Hearings, note 10, p. 171.

[16] House Hearings, note 1, p. 1335; Senate Hearings, note 10, *supra*, pp. 8, 119, 171.

[17] Senate Hearings, note 10, p. 188.

would be likely to require increased fees, while at the same time the station's local advertisers would refuse to increase their payments because they desired coverage only in the station's own local market.[17a]

5. *Copyright.* The copyright system has evolved into a form that represents overall accommodation to the complexities of the television industry. About half of the network programs are covered by statutory copyright.[18] A part of the programs are produced and copyrighted by the networks. The remainder of the copyrighted material is obtained by the networks from several score of independent program producers. The producer usually obtains licenses for the underlying copyrights from the owners. The network copyright licenses cover the broadcast by their affiliated stations.

Virtually all of the stations broadcast so-called "syndicated" programs, which are licensed directly to them by producers and others. The producers include local stations that produce some of their own programs, as well as networks, which sometimes "syndicate" programs after intial network transmission.

Music performed by the network or the broadcast station is licensed independently of the program, under a blanket license, by which for a fixed percentage of revenue the network or station is authorized to play any composition in the repertories of the performing rights organizations.[19]

[17a] Senate Hearings, note 10, pp. 172, 199.

[18] CBS advised the Congress that in a typical week in 1966 some 53% of its broadcast time covered programs which were not copyrighted. Senate Hearings, note 10, p. 224.

[19] There are three societies, each operating in broadly the same manner: American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; and SESAC, Inc. They were formed, many years ago, in order to solve the problem of dealing between thousands of composers and publishers and an equivalent variety of licensees. Senate Hearings, note 10, pp. 130-156.

The copyright system also reaches backward to protect the actors and authors. In the typical case, other than that of the so-called "star," the film actor's compensation derives more from his "rerun" payments than from the payment for his initial performance, and these subsequent payments are dependent upon copyright payments to the producer.[20] The deferred payments to the author work in much the same way, and are similarly paid out of copyright license income.[21]

6. *The Economic Structure of the Industry.* It is estimated that in 1967 some 94% of the households in the country owned a television receiver.[22] There were, at the beginning of 1968, 792 television broadcast stations in the United States, of which 646 were commercial stations, divided into 501 VHF and 145 UHF stations.[23] Most of the commercial stations are affiliated with a network but a growing number are not affiliated.

The Federal Communications Commission has by regulation imposed restrictions upon the ownership of television stations designed to prevent concentration of ownership. For example, no license will be granted to a station which has a Grade B contour which overlaps that of another under the same control, and at a maximum there cannot be more than seven (five VHF) stations under common control. 47 C.F.R. § 73.636.

The larger television broadcast stations are in healthy financial condition.[24] But the smaller stations are in a

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[20] Charlton Heston, President, Screen Actors Guild, Senate Hearings, note 10, pp. 205-210.

[21] Evelyn F. Burkey, Executive Director, Writers Guild of America, Senate Hearings, note 10, pp. 227-230.

[22] Estimate of Advertising Research Foundation, Inc., from U.S. Census Bureau data as given in NAB, *1967 Dimensions of Television,* p. 16.

[23] *Broadcasting,* Feb. 5, 1968, p. 67.

[24] In 1966, 593 television stations earned, before federal tax, $306 million. F.C.C., TV Broadcast Financial Data—1966, Pub. Notice 5317 (Aug. 25, 1967), Table 2.

marginal position; about half of those with gross revenue of less than $400,000 in 1963 were losing money[25] and in 1966 114 UHF stations lost $7,400,000 in the aggregate.[26] In 1966 operations were profitable for 87 per cent of the VHF and for 59 per cent of the UHF stations.[27]

Program expense, including either the cost of production or license fees to an independent producer, is much the heaviest expense of television broadcast. In 1966 it represented 63% of total expense and 49% of total revenue of the industry.[28]

B. *The CATV Industry*

1. *Technology.* The CATV system picks up signals from one or more broadcast stations either by direct reception alone or, if the originating station is distant from the CATV service area, by microwave relay of the signal to the CATV equipment. Over 450 CATV systems now in operation use microwave relays, for distances up to 665 miles from the originating station.[29]

The findings of the district court as to the technology of CATV transmissions are detailed and precise (J.A. 38a-59a, 73a-74a). So far as here important, they show that CATV transmission in its electronic operation is indistinguishable from television broadcast.[30] Indeed, with only a

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[25] Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry* (Report to F.C.C.), (1965), p. 87 (hereafter cited as "Seiden Report").

[26] F.C.C., TV Broadcast Financial Data—1966, Public Notice 5317, Aug. 25, 1967, Table 2.

[27] *Id.*, p. 1.

[28] *Id.* These statistics are computed from Tables 3 (showing revenues) and 8 (showing expenses). For the networks program costs are 84% of total expense and 77% of total revenue; for the broadcast stations they are 43% of total expense and 29% of total revenues.

[29] Second Report, note 8, p. 4558.

[30] The electromagnetic waves received on the antenna travel on coaxial cables from the antenna to the building at its base which houses the "head end" equipment. This equipment produces carrier waves, more powerful

minor amount of supplemental equipment the CATV equipment can originate live or recorded television programs. At the beginning of 1967 at least 527 CATV systems originated their own programs and the trend is increasing very rapidly.[31]

From the CATV transmitting station the carrier waves are transmitted through coaxial cables. This is a process identical to a broadcast except that the signals are confined to the cable, their field of radiation being constricted by the electro-conductive core and circumference of the cable. Trunk line cable is used to carry the signals to the community to be served. Distribution cables lead off from the trunk line and individual "house drop" cables extend from the distribution cable to the home of the subscriber. The signal becomes progressively weaker as it goes through the cable and it is necessary to insert amplifiers at regular intervals along the trunk line and distribution cables. The two systems operated by petitioner utilize 665 miles of cable and 1,017 amplifiers; the amplifiers require the use of 2,000-3,000 vacuum tubes, as contrasted to the 150 tubes used in the ordinary broadcast station. (J.A. 51a-52a.)

Each CATV channel can carry the signal of one broadcast station. Until 1962 the majority of the CATV installations had a capacity to receive and retransmit 5 channels; from 1963 onward the majority being installed had a 12-

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than those received, which are modulated in vacuum tubes or transistors to duplicate the amplitude and frequency characteristics of the signals received. (J.A. 46a-47a.) The equipment includes, or can include, a device to cut off any program on any channel. (Senate Hearings, note 10, p. 112.)

[31] The 527 stations were 36% of the 1440 CATV systems reporting to the FCC; "informed sources agree that program origination by CATV was negligible until" 1967. *Broadcasters and CATV*, Triangle Publications, Inc. (a major CATV operator), Jan., 1968, p. 10.

channel capacity.[32] The CATV industry is generally being rebuilt into a 12-channel capacity.[33] CATV systems with 20 or more channels are planned.[34]

2. *Economic Structure.* The first commercial CATV system was installed in 1949.[35] By the beginning of 1967 there were 1,770 systems in operation with 2,100,000 subscribers.[36] The Commission has characterized the development of CATV as one of "explosive growth and changing character."[38] The Register of Copyrights has described CATV as "the fastest growing mass communications medium on the American scene."[39] The Commission, while not accepting the estimates as necessarily correct, has noted the statement of the leaders of the CATV industry that "almost all American cities—small and large—will be wired for television," that "within the next decade, 85 percent of all television sets in the United States may be receiving their programs by cable," or, more conservatively, that within that period "CATV may reach 30 to 35 million households."[40]

The capital costs of a CATV system are directly related to the length of cable installation, and thus to the number of anticipated subscribers. The CATV systems studied for the Federal Communications Commission showed capital costs in 1964 which ranged from $150,000 to $1,163,000.[41] A pending franchise application for the Philadelphia area

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[32] Second Report, note 8, p. 4545.
[33] Senate Hearings, note 10, p. 101.
[34] *Id.*, p. 122.
[35] Senate Hearings, note 10, p. 85.
[36] *Television Factbook, 1967,* note 9, p. 54a.
[38] Second Report, note 8, p. 4545.
[39] Senate Hearings, note 10, p. 10.
[40] Second Report, note 8, p. 4558.
[41] Seiden Report, note 25, pp. 24-25.

involves an initial investment of $37,000,000 and is designed to serve 200,000 customers.[42]

While CATV capital costs are high, so are the profits. On a cash flow basis, excluding interest and depreciation, a group of 28 CATV systems studied for the Commission showed a weighted average profit amounting to 57% of gross revenue.[43] This high rate of profit is, of course, related to the fact that the CATV system has so far enjoyed a program cost of zero, while this expense accounts for 49 cents of every dollar of revenue in the broadcast industry (*supra*, p. 21).

The ordinary CATV system seeks to expand its patronage and to hold its existing subscribers through advertising its services. The district court found in this case that "defendant's activities in promoting and advertising television programs on its cables were similar to the promotional and advertising activities of a television broadcasting station."[44] The fragmentary data available suggest that annual CATV advertising expenditure is in the neighborhood of $1 to $2 million a year.[45]

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[42] Senate Hearings, note 10, p. 171; see, also, the Commission's reference to a proposed $40 million investment, Second Report, note 8, p. 4558.

[43] Median expense figures for the 28 systems show the following percentages of gross revenues: salary, 15%; pole rent, 3%; advertising, 1%; maintenance, 3%; franchise tax, 4%; and microwave (for the 15 systems using), 8%. Seiden Report, note 25, pp. 27-31.

[44] The detail of his findings were: "By means of newspapers, radio and by direct mail, they advertised the variety of programs transmitted; • • • that the choice of all three networks was available only to their subscribers; • • • that certain programs • • • could be seen only on the cable • • • • [and that] without subscribing to its system, homeowners in Clarksburg were 'chained to one channel' • • •." (J.A. 34a-35a.)

[45] The Seiden Report indicates that in 1965 the CATV systems studied spent about 1 per cent of their gross revenues on advertising (note 43) while the House Committee report estimates annual CATV revenues at $150,000,000. H. R. Rep. No. 2237, 89th Cong., 2d Sess., p. 78 (1966).

Multiple ownership of CATV systems is common. A tabulation in 1966 showed 25 group owners of CATV systems controlling 671 franchises, with 394 applications pending; groups up to 41 systems were under common ownership.[46]

CATV is, in short, a major business activity. The Commission has said that the long-distance CATV systems "cannot seriously be argued * * * to * * * represent master TV antenna arrangements" and that such a characterization "does not withstand analysis."[47] The Register of Copyrights has considered it a "mass communications medium."[48] The House Committee on the Judiciary, noting CATV "annual revenue of over $150 million," found that the "increasing size and impact of community antenna operations have raised difficult problems of law and policy."[49] Finally, the district court has in this case specifically found that petitioner's systems are "large-scale commercial enterprises, advertising and promoting television programs, and making profit out of the exploitation of television programs" (JA 20a).

3. *Types of CATV.* Petitioner and supporting *amicus curiae* present their argument in terms of a generalized, prototypical CATV system. In fact, however, the varieties of CATV systems in operation are strikingly different. They fall into at least five categories:

(a) *Local.* In the early years of its development CATV

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[46] The largest owner was Jerrold Corp. with 41 systems. Senate Hearings, note 10, pp. 238-239.

It appears, indeed, that petitioner is now owned by American Cablevision Co., one of the larger group owners. Television Factbook, note 9, p. 544a; Senate Hearings, note 10, p. 238.

[47] Second Report, note 8, p. 4561.

[48] Senate Hearings, note 10, p. 10.

[49] H. R. Rep. No. 2237, 89th Cong., 2d Sess., p. 78 (1966).

served largely as a supplement to the local broadcast station, carrying its signals to communities within its market area which, because of terrain or other reasons, could not receive satisfactory signals by direct broadcast from the station.[50]

This local CATV performs a valuable service,[51] though subject to two limitations which inhere in the nature of any CATV system. It is not, in contrast to station or repeater broadcast, useful in service of sparsely populated rural areas because a reasonably concentrated population is necessary to warrant the cost of cable.[52] In the second place, with a substantial installation charge and monthly subscription charges of $5 or $6, CATV is not useful to those who cannot afford this charge.[53]

(b) *Metropolitan.* The comparatively recent development of CATV systems designed to improve reception in the large metropolitan cities is as a technological matter essentially similar to the provision of a supplemental service in the mountain community. In parts of New York City, for example, television reception is often poor and two well-financed CATV systems began operations in 1966.[54] While technologically similar to local CATV, there may well be markedly different copyright implications with respect to metropolitan CATV. If most New York City homes come to be served by CATV, it would be at least anomalous that the medium of communication with much

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[50] Corry, *Community Antenna Television: An Economic Survey*, 2-3 (Cong. Leg. Ref. Serv. 1965) (hereafter cited as "Corry").

[51] Second Report, note 8, pp. 4544, 4548, 4562; Senate Hearings, note 10, p. 110.

[52] Seiden Report, note 25, p. 83; Second Report, note 8, pp. 4544, 4559.

[53] Second Report, note 8, p. 4550; Senate Hearings, note 10, p. 115.

[54] *Television Factbook, 1967*, note 9, pp. 454a, 459a. New York City will not grant a franchise except to a CATV system which confines itself to local, off-the-air programs. Senate Hearings, note 10, pp. 92, 116-117.

the greater revenues should bear no part of the program cost.[55]

(c) *Unserved Areas.* Some CATV systems import signals into communities which have no off-the-air reception at all. This obviously injures no existing broadcast station. It does, however, represent a use of the copyright owner's property to which he has not consented and for which he has not been paid.[56] It serves, moreover, to inhibit the construction of new UHF local broadcast stations, which would also serve the surrounding rural area and those unable to pay the CATV charges, and is accordingly a matter of concern to the Commission and the industry and copyright owners.[57]

(d) *Underserved Areas.* Adequate television service is usually considered to be the ability to receive satisfactorily stations carrying the three networks.[58] The importation of distant signals into an underserved community has the same effect upon the copyright owner and the same tendency to inhibit new UHF construction which was noted with respect to the unserved area. It has in addition an adverse effect upon the local broadcast stations serving the community.

(e) *Imports from Distant Markets.* There is, finally, the distant CATV system which imports programs from other markets and distributes them within the market area which is adequately served by the local broadcast stations. A pending franchise application to distribute New York City programs to the Philadelphia market by means of a

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[55] In 1963 the average broadcast station was estimated to derive in advertising revenue about $1.50 per month per TV home. Seiden Report, note 25, p. 27. The New York CATV subscription rate is to be $5.50 per month (Corry, note 50, p. 9), or $66 per home per year.

[56] Senate Hearings, note 10, p. 116.

[57] Second Report, note 8, pp. 4559-60.

[58] See Seiden Report, note 25, p. 16.

$37 million CATV system (*supra*, pp. 23-24) is one of many illustrations. Another is a planned Denver CATV system which will have 19 channels, including 5 Denver, 8 Los Angeles, and 2 San Francisco stations.[59] This type of CATV, as we show below, is severely injurious to the copyright owner, to the "invaded" television stations, and to the objectives of the Communications Act.

(f) *Numerical Distribution.* We have found no satisfactory statistical data by which to assign the CATV systems to each of these several types of operations, but there are obviously many examples of each. It is also true that in many instances a single CATV system will include operations which fall into two or more of the separate categories.[60]

4. *The Consequences of CATV.* Each of the groups concerned with television broadcasting is injured, in a degree varying from trifling to catastrophic, by some but not necessarily by all of the forms of CATV systems:

(a) *Copyright Owner.* The copyright owner who has sold exclusive performance rights within one broadcast market area expects or hopes to sell those rights within other areas as well. When a CATV system imports the copyrighted program into another market area, the copyright owner's market in that area is eliminated after that performance or is at best greatly diminished. According to the spokesman for the leading film producers, "When

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[59] FCC, Public Notice No. 12154, Feb. 6, 1968.

[60] According to an estimate supplied by the National Community Television Association, based on a 725 system sample in 1964-1965, the 1650 systems in operation in 1966 would be divided into 152 systems which distributed only local signals (received within the Grade B contour of the originating station), 405 systems which distributed only distant signals (although 81 were within some station's Grade B contour), and 1111 systems which received and distributed both local and distant signals. Senate Hearings, note 10, pp. 95-96.

the bloom is off the rose, its value always drops precipitously." [61] The CATV industry itself has recognized that this is unfairly injurious to the copyright owner. Its representative has recognized that "it would put us in the position to dissipate his property value * * * before he had the opportunity to exploit it himself," and has testified:[62]

> In this situation, the CATV system, by definition, is furnishing programs to a group of viewers who are not regarded by the copyright owners as being the normal recipients of the service from the station which has secured a license from the copyright owner. Under these circumstances we are willing to concede that a license from the copyright owners should be required.

The copyright owner suffers also the more traditional injury of lost income through other forms of CATV operation, even though they may not involve this direct destruction of potential markets. CATV transmission to otherwise unserved or underserved markets takes the copyrighted work for sale to audiences for whom the copyright owner has not consented and has not been paid.

Even in the case of local CATV, which brings the program to homes within the market area for which the broadcast station has contracted, there may be damage to the copyright owner. Although he has consented to broadcast use, he may not have consented to another use of his work for which the CATV subscribers have paid the CATV system. This sort of damage cannot be appraised in the abstract, but only on the facts of an individual case, including in particular the terms of the agreement between the copyright licensor and the broadcast station.

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[61] House Hearings, note 11, p. 1335. See, also, Senate Hearings, note 10, pp. 8, 78, 79, 119, 121, 188, 201.

[62] Senate Hearings, note 10, pp. 87, 91.

(b) *The Broadcast Station.* The broadcast station whose normal market area is invaded by CATV transmission of distant programs is, in the words of the Federal Communications Commission, subjected to "most unfair" competition and to a "gross inequity;" [63] its Chairman has characterized the distant CATV operation as "unfair and potentially destructive competition." [64] The unfair competition takes two forms: The most direct injury is inflicted when the local station has paid for exclusive performance rights in its service area and finds its audience dissipated because a CATV system imports and distributes the same program.[65] That damage is especially grave when the CATV retransmission occurs, not simultaneously with the local station's broadcast of the program, but beforehand. Injury arises in a more general fashion whenever the local broadcast station must compete for viewers with a CATV system which has imported without cost programs picked up from larger metropolitan stations.[66] The loss of a viewing market, and thus the loss of advertising revenues, is accentuated when, as is not uncommon, the CATV connection with the subscriber's set is made so as to preclude

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[63] Second Report, note 8, p. 4561.

[64] Senate Hearings, note 10, p. 78.

[65] See Second Report, note 8, pp. 4544, 4561; Senate Hearings, note 10, pp. 78, 111. This injury is not confined to local broadcast stations. The producer commonly does not recover his production costs and copyright fee on the first showing, and depends upon subsequent syndication for his profit. Senate Hearings, note 10, p. 188.

[66] Second Report, note 8, pp. 4544, 4561. The impact of distant CATV is too recent to permit any close measurement of the loss of advertising revenues, but is nonetheless real. Second Report, note 8, p. 4544. In addition it was felt, in 1965, that the phenomenon was too recent yet to be fully appreciated by the advertisers. Seiden Report, note 25, pp. 64-66. See *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd*, 321 F. 2d 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951, where upon an evidentiary record the Commission found unrestricted growth of CATV systems would substantially eliminate revenues essential to the local broadcast station.

off-the-air reception, or when the CATV system does not carry the local broadcast program to its subscribers.[67]

It may be noted that, while the Commission's policy may vary in the two cases, the local broadcast station is equally injured by the distant CATV system whether the invaded area is adequately or inadequately served under the Commission's standards.

There is no immediately discernible injury to the local broadcast station from a CATV system which only distributes signals of that station and other stations serving the same market area. But if the CATV system were to substitute its own for the station's advertising, the injury would be evident. Or if the CATV system originates some of its own programs it is exploiting an audience which has largely been built up by its costless use of the local station's programs, and it seems to the NAB unfair that the local station should have its audience diluted by competition which it considers parasitic.

(c) *Public Interest.* The Commission has found its policies threatened by CATV not only in its injury to existing broadcast stations but in its stifling effect on potential UHF development. CATV systems have tended to concentrate in areas where adequate service can be realized only through UHF broadcast stations, and their exploitation of the local market discourages the needed UHF construction.[68] This threatens the policy of the Communications Act and of the Commission to encourage the development of local broadcasting in order to afford full facilities

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[67] Second Report, note 8, p. 4544. In 1964, prior to the Commission's rule requiring local carriage, a survey showed 433 CATV systems carried the local broadcast programs (Grade A and B contours combined) while 168 did not. Seiden Report, note 25, p. 75. The Commission in its First Report and Order in Docket No. 14895 *et al.*, 38 F.C.C. 683, 702-703 (1965), noted that many CATV systems did not afford their subscribers the choice between cable and off-the-air reception.

[68] See, generally, Second Report, note 8, pp. 4544, 4559-4560.

for local public service programs and announcements and to encourage local self-expression.[69]

Finally, the inherent limitations of CATV operate against the public interest when a CATV system serves to preclude establishment of broadcast service. In place of free broadcasts, service is delivered only at the cost of a substantial installation fee and charges of $5 to $6 a month. In place of a broadcast service, reaching all homes however isolated within the service area, there is substituted a cable service which cannot feasibly be installed except within a reasonably compact community.

(d) *The Future.* These are the dangers which are believed now to be presented by the CATV systems. The alarm of the Commission, of the broadcast industry and of the copyright holders is yet directed more to the future than to the present. Local franchises have been granted, or are under application, under which CATV systems would import New York broadcasts to Philadelphia, and Los Angeles and San Francisco broadcasts to Denver (*supra,* pp. 27-28). It is feared that if CATV realizes the potential which the industry has claimed (*supra,* p. 23), the great bulk of the programs for the entire country will before long be distributed from New York and Los Angeles, bypassing local stations, to the injury or ruin of both the copyright owner and the local broadcaster.[70] Such a wire service would be equally destructive of the statutory and Commission objectives to foster local service, free television, and service to rural as well as urban homes.

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[69] See preceding footnote.

[70] Second Report, note 8, p. 4561; Senate Hearings, note 10, pp. 113, 170-171, 121-22.

C. *Moves Toward Solution*

It is evident that the explosive development of the CATV systems has presented to all concerned problems of the utmost gravity and difficulty. The Register of Copyrights has said that the legislative "need is for a reasonable, well-considered compromise, and for a fair-minded, flexible approach on the part of all the interests affected in working toward it."[71] In that spirit, we believe, the agencies of government are moving toward at least a tolerable and perhaps a satisfactory solution of some of the novel and important issues consequent upon the accelerating spread of the CATV system of television distribution.

1. *The Commission.* It is unnecessary, since *United States* v. *Southwestern Cable Co.*, No. 363, and *Midwest Television, Inc.* v. *Southwestern Cable Co.*, No. 428, are to be argued with this case, to detail the course of the Federal Communications Commission's attack upon this problem. We explain, in Part III of our argument, that the Commission regulations do not and are not intended to deal with the copyright issues, and that the decision of the court below lends valuable reinforcement to the Commission's objectives.

2. *The Congress.* A general revision of the copyright law, proposed by the Register of Copyrights, was introduced in 1964, but no final action has yet been taken by the Congress.[72] The CATV issue is considerably the most complex and difficult of the issues considered in the Copyright

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[71] Senate Hearings, note 10, p. 10.

[72] H.R. 11947 and S. 3008, 88th Cong., 2d Sess. (1964). The bills were reintroduced in the 89th Congress. H.R. 4347 and S. 1006 1st and 2d Sess., 1965 and 1966, respectively. Both the House and the Senate Committees held extensive hearings and similar bills were introduced in the 90th Congress. The House bill, H.R. 2512, was reported out and passed the House in the first session (113 Cong. Rec. H 3888 (daily ed. April 11, 1967)); no action has yet been taken by the Senate Committee.

Revision bill. The Register of Copyrights has taken the position that, despite difficulties of administration, CATV systems should be liable for copyright infringement.[73] Section 101 of the current copyright revision bills accordingly serves to continue CATV copyright liability by defining public performance to mean "to transmit or otherwise communicate * * * by means of any device."

The House Committee on the Judiciary, as Section 111 of the bill, proposed an elaborate and graduated limitation of CATV copyright liability.[74] In the course of floor debate it was stricken by the House in order to allow Commerce Committee consideration, and the bill passed with absolute CATV liability continued by Section 101.[75] In the Senate, S. 597 was introduced in a form identical with the copyright revision bill reported by the House Committee, and accordingly contained section 111.[76] The Senate Committee has not yet reported the bill out.

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[73] Deputy Register of Copyrights, Supplementary Report of the Register of Copyrights: 1965 Revision Bill, p. 42; Statement of House Hearings, note 1, p. 42.

[74] Section 111 as reported by the House Committee exempts from copyright liability those CATV systems which are transmitting local signals within their normal service area and which do not originate programs of their own. It provides for compulsory licensing and payment of reasonable royalties when CATV extends a signal beyond that area and into an inadequately served area. It further provides for full liability and free negotiation of copyright licenses when the CATV extends a signal beyond its normal service area and into an adequately served area. In addition, a copyright proprietor can give any CATV operator importing a distant signal notice that the local broadcaster has exclusive right to the program. If the CATV operator carries the distant program he is fully liable, whether he operates in an adequately or inadequately served area. Likewise, where normal service areas overlap, the copyright holder can protect the exclusivity of the local broadcasters in the overlap by giving the CATV system notice of the exclusivity. H.R. Rep. No. 2237, 89th Cong., 2d Sess., pp. 7-9, 77-88 (1966); H.R. Rep. No. 83, 90th Cong., 1st Sess., p. 6 (1967).

[75] 113 Cong. Rec. H, 3646-47, 3859, 3888 (daily ed., April 6, 11, 1967).

[76] 113 Cong. Rec. S-632 (daily ed., January 23, 1967).

II

Petitioner Has "Performed" or "Reproduced" the Copyrighted Work "in Public"

Section 1 of the Copyright Act gives to respondent the exclusive right—

> (c) * * * to play or perform it [the copyrighted nondramatic work] in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. * * *
>
> (d) To perform or represent the copyrighted work publicly if it be a drama * * *; to make * * * any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; * * *.

The tautology of the statutory language is abundant evidence that the Act was intended to reach *every* public use of the copyrighted work "by any method whatsoever." If there be any unlicensed public use of the work which is not an infringement, it would have escaped through the fence of the many reinforcing words accumulated in § 1(c) and (d). Most certainly the CATV system can make no such escape.[76a]

A. *The Practical Facts*

The CATV system from any practical view cannot be considered as beyond the broad sweep of the statutory words.

[76a] While the Solicitor General stresses both the term "perform" and the term "reproduce" (Mem. pp. 3, 5), petitioner evidently considers the latter term irrelevant (Br. p. 28 n. 23). The Solicitor General is correct. In *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191, 200, 201 (1931), the Court stated that "the reception of a radio broadcast and its translation into audible sound . . . is essentially a reproduction," and that "[r]eproduction in both cases amounts to a performance."

1. Quite obviously Section 1(c) and (d) cannot be confined to the lay or "ordinary" use of the word "performance," in the sense of an actor on a stage. Congress used too many words, of all-encompassing scope. Moreover, if shaping electro-magnetic waves so that they convey a signal to be translated into sight and sound should be held not to be "performance" or "reproduction," then there would develop a massive destruction of the rights granted by the Copyright Act. This could unsettle the practices of many industries and threaten ruin to the producers, actors, authors, and supporting personnel whose livelihood rests upon copyright protection. Television broadcasters and networks, radio broadcasters and networks, and conceivably even newspapers and magazines printed by remote cable, would all seem able to claim immunity because their reproduction was done by electromagnetic waves and not by pencil or machine.

2. In particular, no basis can be suggested by which the identical electronic processes of the broadcast station and of the CATV transmitter (*supra*, pp. 11-13, 21-23) can be held a "performance" or "reproduction" in the one case and not in the other. Nor is it easy to see a relevant difference between CATV retransmission of broadcast signals and the local broadcast station's retransmission of network signals.

3. We have in CATV no humble adjunct to a home receiver. The cable systems usually involve very substantial capital costs (*supra*, p. 24). The typical CATV system is actively engaged in advertising and is in aggressive search of new subscribers to whom it may offer the programs paid for by others (*supra* p. 24). The rate of return for CATV operations, with an average cash flow of 57 per cent (*supra*, p. 24), is fabulous by most commercial standards. The industry, apparently including petitioner itself, is coming in-

creasingly under the control of large corporate multi-system owners (*supra*, pp. 24-25 n. 46).

4. The programs transmitted by CATV are costly to the television broadcaster; 49% of the industry's revenue is spent in their acquisition (*supra*, p. 21). It would be an extraordinary perversion of the copyright law to allow those programs to be gathered free by the CATV system for sale on a large scale to its own subscribers.

5. The conclusion without more would be that this is precisely the sort of activity for which the copyright owner can demand a license for the use of his work. But the practical case for CATV liability does not stop with its own role as a merchandiser of others' programs. When distant television signals are brought into a local area, they destroy or injure the copyright owners' market in that area (*supra*, pp. 28-29). It is not every litigant who urges that he not only has a right to another's property but also has the right to use that property so as to destroy or dilute its value to the owner.

6. Beyond the copyright owner's injury, the distant CATV is inflicting major injury on the local broadcast station whose market is invaded by exhibition of the very programs for which the local broadcaster has purchased exclusive rights, and in addition by offering unpaid program competition from stations in large metropolitan areas for the other programs which the station has bought or produced for its local audience (*supra*, pp. 30-31).

7. Finally, this freedom from the ordinary obligation to purchase programs is in effect a compulsory subsidy from the copyright owner and the broadcast station enabling the distant CATV system to threaten basic policies of the Federal Communications Act. Local self-expression, service to those of modest means, service to rural areas, all require the local broadcast station. CATV inhibits the development of local UHF stations and threatens the con-

tinuance of some now in operation (*supra*, pp. 31-32). Copyright exemption in such circumstances is hardly compelled as a matter of policy.

8. The petitioner seeks to brush these matters aside by a strained analogy and by a forecast of ruin if copyright liability be recognized.

The analogy is to the apartment house master antenna. It is inapt. The apartment owner who erects a single antenna is not in the business of selling programs. He has no elaborate transmission facility that is the virtual duplicate of the broadcast station. He does not advertise his programs to the public. He forecloses no market for the copyright owner nor does he injure a broadcast station. He simply supplies an antenna, as he supplies a refrigerator, stove and electric light, as a part of the furnishing of the apartment that is more sensibily done by landlord than by tenant.

Petitioner's forecast of CATV ruin under the impact of damages for past infringement was heavily stressed in its petition but has only subdued and incidental mention in its brief on the merits. As we explain in the final part of this brief, the forecast can only rest upon an erroneous assumption that the courts will abandon their discretion in the award of a money judgment and will substitute instead a rigid rule that all the various forms of CATV operations in all the diverse copyright relations are to be punished as indistinguishable infringements.

B. *The Law of Infringement*

We see no occasion to make our own statement of the case law which has without exception kept the broad reach of the Copyright Act abreast of the expanding technology of this century. The law has received thoughtful attention in the courts below. It is succinctly but forcefully developed by the Solicitor General in his Memorandum for

the United States (pp. 2-5) and will, we anticipate, be explained in depth by the respondent. These arguments we adopt, without redundant amplification.

III

Relevance of the Federal Communications Act and the Commission's Rules

This Court in *United States* v. *Southwestern Cable Co.*, No. 363, and *Midwest Television, Inc.* v. *Southwestern Cable Co.*, No. 428, will consider the validity of the rules that the Federal Communications Commission has promulgated in order to regulate CATV operations. Strictly speaking, only if those rules were incompatible with CATV copyright liability would they be pertinent to the questions presented in this case. We show below that they are not incompatible, but rather are complementary, and we show also that the rules cannot eliminate the need for subjecting CATV to copyright liability in order to protect the legitimate interests of the copyright owners and the broadcast stations.

1. *There is No Conflict.* Petitioner's contention that the Commission's rules are in conflict with the lower court's decision in this case founders upon the Commission's contrary declarations. Thus, in its report announcing the regulations, the Commission stated that its

> decision is not intended to affect in any way the pending copyright suits, involving as they do matters entirely beyond our jurisdiction. We have simply taken into account the existing practices of CATV systems * * *. In short, if the copyright suits are decided adversely to the CATV industry, we may, as stated in our first report, have to revise our rules.[77]

[77] Second Report, note 8, p. 4557.

The Commission has, indeed, directly answered the only contention by petitioner that specifically identifies an asserted conflict—the contention that "[w]hereas the F.C.C.'s 'carriage rule' requires a CATV system to carry, upon request, the signal of a station within whose B contour it is located, the decision below would make the system liable for copyright infringement if it obeys the regulation and performs such carriage" (Br. p. 71). But the Commission has specifically ruled that stations cannot assert the carriage requirements of the rules and still maintain the right to proceed against the CATV system for copyright infringement. A station making such a request "must confer such [copyright] authorization as may be required from it."[78]

Petitioner also argues more generally that copyright liability would conflict with the Communications Act's policy of "free public access to broadcasts" (Br. p. 80). But of course CATV, in light of its substantial charges to subscribers, hardly accords with that policy either, as petitioner interprets it. More importantly, petitioner's argument proves too much, for under it the broadcasters, as well as the CATV systems, should be free of copyright license requirements.[79]

2. *Copyright Protection Remains Necessary.* The Com-

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[78] Reconsideration of Second Report and Order, 6 FCC 2d 309, 8 Pike & Fischer, RR 2d 1677, 1685 (1967); *Berks TV Cable Co.*, 9 Pike & Fischer, RR 2d 664, 665 (1967). See also Second Report, note 8, p. 4557, n. 51a (". . . [S]tations will have to take into account the effect of any copyright decision in making requests for carriage under the present rules."). It may also be noted that, insofar as the Commission's rules require deletion of programming, there is of course no conflict with the copyright laws. *Green Mountain Television Corp.*, 9 Pike & Fischer RR 2d 231 (1967); *Robins Telecable Corp.*, 9 Pike & Fischer RR 2d 267 (1967).

[79] The sole legislative history cited by petitioner—the remarks of Senator Dill (Br. p. 80)—were addressed to the freedom of broadcasting from charges *by the Government.* See 67 Cong. Rec. 12335, 12352 (June 30, 1926).

mission rules will serve in some measure to protect copyrighted materials from unlicensed exploitation by CATV. But they do not by any means obviate the necessity for copyright protection, for the regulations afford such protection only accidentally and partially.

The Commission rules do not, and could not, provide any protection for the copyright owner himself. They afford him no way to control the use of his work, nor to receive payment for its use. They offer only incidental and incomplete protection against destruction of his markets by unlicensed CATV importation from distant areas.

To the extent the Commission's rules protect the local station and to an incidental degree the copyright owner, they do so by virtue of the "local carriage," "non-duplication," and "distant signal" principles. The first two are embodied in Rule 74.1103. That rule requires a CATV system, subject to numerous and intricate exceptions, on request to carry the local broadcaster's programs and to avoid duplicating those programs by importing the same program from a distant station. The most important deficiency in the rule is that duplication is forbidden only during the 24-hour period in which the local broadcaster presents the program. Because most network programming, unlike syndicated programming, is released to the local broadcasters on the same day, this rule is considered by the Commission to afford adequate exclusivity for those network programs. But it offers protection to no other type of program. Syndicated programming—feature films, series reruns—is broadcast at the convenience of each local broadcaster, and accordingly the twenty-four hour limitation on duplication clearly does not prevent the CATV operator from showing syndicated programs originating in distant markets before they are presented by the local broadcaster. Rule 74.1103, therefore, does not protect the unaffiliated stations; it does not protect the non-network

programming of affiliated stations; and it does not protect those stations affiliated with more than one network, who must store programs more than 24 hours for delayed broadcasting.[80]

Nor does the "distant signal" rule, Rule 74.1107, solve the problem. It prohibits importation of a distant signal into the Grade A contour of any station operating in the 100 largest markets without notice and an opportunity for a hearing.[81] This rule, however, does not apply to more than 1500 CATV systems operating prior to February 15, 1966, because they were "grandfathered" by the provision. Moreover, the rule is frequently waived without hearing, as seems permissible under Rule 74.1109.[82]

Aside from these substantial deficiencies, the public interest hearing required by the rule is not suitable for determining the issue of program exclusivity. The rule is not in any way directed to the interests of copyright proprietors. The hearings decide only the broad issue of whether a CATV operator shall be allowed to import a distant signal at all. Even if importation is deemed in the public interest, it does not follow that the CATV operator should be permitted to import these signals when they are carry-

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[80] Second Report, note 8, p. 4549. Delayed broadcasting occurs most frequently in markets having one or two stations. It represents 5½ and 11 hours respectively of the median station's weekly programming.

[81] While Rule 74.1107 purportedly requires a hearing when a CATV system seeks to extend distant signals into the Grade A contour of the top 100 markets, it also permits a hearing, upon motion by the Commission or petition, when CATV seeks to extend any signal beyond its Grade B contour.

[82] For example, see *Channel 9 Syracuse, Inc.* v. *FCC*, 385 F. 2d 969, 975 (D.C. Cir., 1967), where the Commission waived its rules and permitted three CATV systems to import a total of 10 non-network signals from New York and one signal from Canada into the Grade A contour of Syracuse broadcasters. The Syracuse area is the 35th largest television market and is served by 3 VHF and 2 UHF stations. The Court of Appeals reluctantly affirmed the Commission and strongly suggested that "the Commission should require greater factual specificity in petitions for waiver and in the proof, and in its decisions should more clearly articulate the public interest considerations on which it determines to waive."

ing programs which the local broadcaster has himself arranged to broadcast. Yet in this case the Commission's regulations provide only 24-hour protection against duplication. It is evident, therefore, that Rule 74.1107 is not proportioned to the needs of local broadcasters. They must either oppose the importation of all distant signals or rely solely upon the very limited protection of the 24-hour nonduplication provision of Rule 74.1103.

The Commission has itself recognized that, in view of the evident limitations upon its power to make fully discriminating regulation of CATV operations, complementary reliance upon the copyright law is both appropriate and desirable. This is most clearly shown in the Commission's abandonment of its attempts to provide adequate exclusivity for syndicated programs. It explained that its initial proposal to allow a 15-day exclusivity was being withdrawn not because it was unnecessary but because it was ineffective with respect to syndicated material. It continued:

> Rather, we have determined that we must look elsewhere if we are to achieve effective relief in this respect. * * * As a general approach encompassing all stations, we are proposing to the Congress that it consider the question of extending the rebroadcast concept of section 325(a) [requiring permission of the originating station] to CATV. It may be that regulation of this nature would prove a preferable and more effective means of achieving fair recognition of the exclusivity contracts of the program market place.[83]

But if amendment of the rebroadcasting provision might assist in "achieving fair recognition of the exclusivity contracts of the program market place," plainly copyright

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[83] Second Report, note 8, p. 4549.

recognition would do the job more effectively.[84] Thus, in his testimony before the Senate on copyright revision, Chairman Hyde, while noting the division of opinion among the Commissioners respecting the Commission's rules, added:

> However, there is far greater unanimity in the Commission that copyright considerations should play an instrumental role in the CATV field and that the resolution of the copyright problem may have a most significant effect upon the CATV regulatory program which we have recently adopted.[85]

And in its March 31, 1967, report on H.R. 2512, the Copyright Revision bill, the Commission expressed even more strongly its opposition to outright exemption of CATV from copyright liability and the importance to the Commission of the play of the copyright market:

> "H.R. 2512 would eliminate this crucial element of unfair competition. It would insure CATV operation within established copyright requirements, and thus, in effect, make the market place play a major role in regulating the conduct of CATV vis-a-vis broadcast outlets. At the same time the bill is carefully fashioned to permit CATV to continue to fulfill its important role of bringing needed service to areas which are underserved either because of their terrain, remoteness, or sparse population. The Commission believes that enactment of a bill along the lines of H.R. 2512 would contribute very greatly to the effective and fair integration of CATV into the

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[84] Rebroadcast permission is given by the originating station, while the station which is injured is that whose territory is invaded. This can at times produce unsatisfactory results. See *Laramie Plains Antenna TV Association*, FCC File No. BPTTV-2774-76, Jan. 12, 1968.

[85] Senate Hearings, note 10, p. 14.

television structure of the country. It would also benefit the Commission by shifting a major portion of the regulatory burden from the agency to the market place, where it more properly belongs.[86]

IV

Petitioner Has No License Implied in Law

On his first view of the case, in connection with his recommendation that the Court vacate the grant of certiorari and hold the petition pending legislative action, the Solicitor General suggested that anything but a "simple 'yes' or 'no' answer" to the copyright infringement issue was within the province of the Congress but not of the courts (Mem. p. 2). The Solicitor General now, however, has changed his mind. He suggests that there be implied as a matter of law "a license for CATV carriage of signals within the normal service area of the originating station," that area to be defined as the station's predicted Grade B contour. We submit that any such determination would be the creature of judicial invention, not judicial construction.

The Solicitor General candidly concedes that there is a "significant lack of precedent" for the doctrine he advances. Indeed, he himself effectively distinguishes the few cases that might conceivably be thought relevant.[87]

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[86] Hearings before the House Committee on Interstate and Foreign Commerce, 89th Cong. 1st Sess. ser. 90-1, p. 574 (1967).

[87] The Solicitor General does term the "fair use" doctrine "analogous"—a doctrine that, he notes rather ambiguously, applies to "certain acts of copying" (Mem. p. 8 n. 5). It has been argued that the doctrine extends only to insubstantial copying or use, not to the copying or performance of an entire work. *Public Affairs Associates, Inc.* v. *Rickover*, 284 F. 2d 262, 272 (D.C. Cir. 1960), *vacated on other grounds*, 369 U.S. 111; *Benny* v. *Loew's Inc.*, 239 F. 2d 532, 536 (9th Cir. 1956), *aff'd by equally divided Court*, 356 U.S. 43 (1958). *Cf. Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 306-310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Toksvig* v. *Bruce Pub. Co.*, 181 F. 2d 664, 667 (7th

But of course lack of precedent, while certainly suggestive, is not decisive. What *is* decisive is that, even giving all of the factors mentioned by the Solicitor General precisely the weight he assigns them, it is plain that those factors do not support the judicial action he recommends.

To begin with, the Solicitor General concedes that there is not any provision of the Copyright Act that can be construed so as to support the implied in law limitation upon the copyright proprietor's rights. As he persuasively and correctly asserts, the only relevant provisions, Sections 1(c) and 1(d), cannot fairly be read except as embracing all CATV transmission. Nonetheless, he recommends that "a rule of law [be] fashioned by the courts in order to take care of practicalities, equities, and other factors * * *". (Mem. p. 6).

But obviously the courts cannot disregard statutes simply on the basis of their view of the "practicalities, equities, and other factors." What the courts *can* do, to be sure, is to limit the broad sweep of a statute on the ground that the Congress has enacted other statutes that cannot otherwise be given their full play, and because it can fairly be concluded that the Congress intended that in cases of conflict the one statutory scheme be preferred to the other. But what is notably absent from the Solicitor General's discussion is any contention that there is any such conflict between the Copyright Act and other statutory provisions.

Cir. 1950). In any event, if the central question of fair use is whether the alleged infringer's activity " 'tends to diminish or prejudice the potential sale of the plaintiff's work' " (Mem. p. 8 n. 5), the doctrine does not support the implied in law contention. Any CATV subscriber located within the Grade B contour of a television station who sees a copyrighted work that he could not adequately have received off-the-air is obviously a less likely customer of any later effort by the copyright proprietor to make that work available to him whether on television, in motion picture theaters or—a likelihood pointed to by the Solicitor General (Mem. p. 7 n. 4)—by direct licensing to CATV systems for program origination.

To be specific, as to the anti-trust laws, he says merely that "[a]nother objective to be kept in mind is minimizing the potential for monopolization of an industry" (Mem. p. 6). But this hardly amounts to an assertion that the anti-trust laws conflict with the Copyright Act as construed by the Second Circuit, or that affirmance of that decision would "operate to frustrate the purpose of the . . . federal legislation" respecting monopolies. *Teamsters Union* v. *Morton*, 377 U.S. 252, 258 (1964). Plainly, the two statutes can both be given their full scope in independent proceedings, and the Solicitor General does not contend otherwise. Indeed, he does not even say that the antitrust laws are the source of the implied in law notion—merely that they are "to be kept in mind."

Moreover, the Solicitor General supports his almost casual observation that they should "be kept in mind" only with a footnote stating, without any reference to the source, that "the control of copyrights on television programming is concentrated in the three networks and seven major movie studios * * *" (p. 7, n. 4).[88] Surely more substantial factual data would have to be advanced before

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[88] It is useful in this connection to compare that assertion with the somewhat different testimony of Acting Assistant Attorney General Zimmerman before the Senate Committee—the sole "evidence" supplied by petitioner in support of its arguments respecting the antitrust laws (Br. pp. 63-64)—that "ownership and control of copyrights is highly concentrated in the networks, movie studios *and other television producers* [emphasis supplied]"—an unexceptionable but meaningless observation. Senate Hearings, note 10, p. 212. Compare also the statement of Richard W. Jencks, then Deputy General Counsel of CBS, that "during each year in the period from 1957 to 1964 first run programming for the commercial networks was supplied by 65 to 76 active program producers" and that, on a non-network basis, "'[i]n 1965 there were 148 different distributors of programs available for syndication to United States television stations." *Id.*, at p. 224. See also the testimony of Frederick W. Ford, President of the National Community Television Association, that "references to standard trade publications illustrates that there are several hundred copyright proprietors claiming rights in television programs. . . ." House Hearings, note 1, p. 1253.

as unprecedented a doctrine as the implied in law rule could be said to be required by the antitrust laws—a claim, we repeat, that the Solicitor General does not make.

Nor does he hint that the Federal Communications Act or the rules of the Commission require, or even in any fashion support, the implied in law license. His entire discussion of that Act is directed to the question whether the Grade B contour can appropriately be used as a measure of the broadcast stations' service area.

In the end, it seems that his theory is rooted in his notions of a wise copyright policy. He considers that "the economic realities of the broadcasting industry suggest the appropriateness of implying a more limited license" because, in his view, this would not significantly decrease the value of copyrighted material (Mem. pp. 9-11). But surely, apart from the merits of his views on the operations of the market, all that this comes to is a suggestion that the legislative purpose reflected in Sections 1(c) and 1(d) be ignored in situations where the courts might prefer—on grounds of "practicalities, equities, and other factors"—a different rule of liability. The power the Solicitor General asks the Court to wield is that of the Congress and not of the courts.

While the Solicitor General is silent as to the Communications Act, petitioner is not. Petitioner's version of the implied in law theory is based upon the policy of the Communications Act to promote "free public reception of licensed broadcasts" (Br. p. 80),[89] together with the policy

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[89] Understandably the Solicitor General does not seem to share this view. In *United States* v. *Southwestern Cable Co.*, No. 363, the Solicitor General suggests that without FCC regulation of CATV "the whole system of 'free' off-the-air television service might thus have been undermined. To a substantial degree, only those financially able to afford to pay monthly CATV charges and in an area where CATV could economically be provided would have been able, in the wake of the demise of local stations, to receive television service." (Br. 35).

of the Copyright Act to promote the dissemination of the author's or composer's work.

If petitioner's argument stopped there, it would be patently preposterous, for it would free the broadcast station and the network alike from the necessity of paying copyright fees. Petitioner accordingly takes care to add that these policies preclude only a "second" copyright fee for the same performance. The argument, to begin with, assumes that CATV does not "perform" the work. That assumption, as we have demonstrated, is incorrect. But in any event, there is no reason in logic why these statutory policies would make one performance free and require a license for the other. And even if it be assumed that the policy argument could be so finely tooled as to reach that result, it still proves a great deal too much to be valid. For example, the symphony orchestra or the municipal light opera group pays the copyright owner a modest license fee for the use of a copyrighted work. Is the network or the local broadcast station, then, exempt from copyright liability when it broadcasts the performance? Nor, surely, can one broadcast station escape copyright liability if it simultaneously rebroadcasts the signals of another. One may wonder, finally, if petitioner really urges that the CATV system should be free to sell for profit a program originally licensed for an educational broadcast without fee or at a nominal fee.

Even if these inherent difficulties could somehow be resolved, there are other serious problems in the communications field that would be generated by adoption of the implied in law theory. Since the basis for the doctrine is murky at best, it is wholly unclear what the applicability of the doctrine would be to modes of transmission other than CATV or to forms of communication other than television. Thus, the theory would seem to apply to CATV

retransmission of radio programs, but within unspecified and wholly undeterminable limits in view of the inapplicability of the Grade B contour criterion to radio broadcast. Background music systems like "Muzak" that furnish music by wire to their subscribers and now pay copyright proprietors for the right to do so would seem equally entitled to an implied in law license to use off-the-air musical materials.[90] Satellites, translators, and boosters—all means of extending the signal and coverage of broadcast stations—are often located within the Grade B contour of stations whose signals they retransmit, and hence would seem to be entitled to the freedom the Solicitor General recommends be given to CATV systems. So indeed would any other broadcast station whose coverage area was identical to or within the coverage area of another originating station. If such a station retransmitted the programming, having first obtained consent from the originating station under Section 325 of the Communications Act—but not from the copyright proprietor—it would surely seem that, under the implied in law theory, the retransmitting station was doing no more than reaching the same audience that the copyright proprietor had intended be reached. But from an economic standpoint it would still be true that the exposure of the author's copyrighted material on two or more stations in the same area would *in fact* reach more persons than if it had been exposed only over one, and that the interest of these additional persons in seeing the work at some other time or over some other medium or by means of a subsequent broadcast would accordingly have been diminished to the obvious detriment of the copyright proprietor.

To these practical considerations must be added a compelling point of law—petitioner's reliance upon the Com-

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[90] See *Leo Feist, Inc.* v. *Lew Tendler Tavern Inc.*, 267 F. 2d 494 (3d Cir. 1959).

munications Act is undermined by Section 325 of that statute, which prohibits "rebroadcast . . . without the express authority of the originating station.". Thus the Congress has explicitly declared that the policy of the Act in favor of dissemination of television programs does not go so far as to authorize the pirating of a station's signals. Rather, the originating station is given a right of defense quite analagous to the protection the copyright proprietor and the "invaded" station can receive under the Copyright Act.

Moreover, surely the difficulty of marking the limits of an implied in law license argue against its adoption. Since the Solicitor General himself outlines the problem (Mem. p. 14), we merely note that the predicted Grade B contours may depart widely from the actual reception conditions surrounding a station's broadcasts (*supra*, p. 15), and that it is difficult to justify a theory that departs from the factual assumptions which underlie it. On the other hand, it is also true, as the Solicitor General evidently fears, that if the implied in law license were to be gauged by the actual service areas of the stations, predictability would be at a minimum and controversy and litigation at a maximum.

Finally, we note the Solicitor General's suggestion that his proposal somehow draws strength because it "coincides, at least in rough outline, with the most likely legislative resolution of the matter of CATV copyright liability for the future." (Mem. p. 16.) Even if this observation were somehow relevant, it is not valid. It is true that Section 111 of the Kastenmeier bill (H.R. 2512, 90th Cong., 1st Sess.)—a provision that, we have noted, was *not* included in the measure the House passed—would provide in many situations copyright immunity in the "normal service area" of the originating station. However, not only is "normal service area" not coextensive with Grade B

contour, but also the bill would impose compensating obligations upon CATV systems. One of the most important of those obligations would be that the CATV systems not originate entertainment programs, since otherwise they would become, in the local service areas, competitors of the broadcast stations, and should in such circumstances not be permitted to utilize without cost the programs that are so expensive to the broadcasters. This consideration is of special importance in a place such as New York City where there is a large market concentrated within the Grade B contours of the local stations and where, accordingly, if CATV is not only free of copyright costs but also free to originate programs, it could work grave harm to the local broadcast stations.

Moreover, Section 111 addressed itself to a serious problem that the Solicitor General's proposal leaves in the air—the problem of contour overlap, which he describes but leaves with the singularly opaque observation that it "can properly be left for case-by-case resolution" (Mem. p. 15). *What* is to be decided case-by-case, and upon what standards? Are the courts supposed to delineate the actual service areas in cases of overlap? If so, are they then to be free nonetheless to permit intrusion of CATV? If so, what criteria are they to apply? Section 111 would deal with the matter by permitting broadcasters having exclusive rights in overlapping service areas to notify CATV operators that they may not retransmit the signal, and failure to honor such a notification would subject the CATV operator to full copyright liability.[91]

All of these reasons demonstrate the infirmity of the implied in law doctrine. If, as well may be, it is desirable to have a code that reconciles the conflicting interests of

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[91] H.R. 2512, 90th Cong., 1st Sess. Sec. 111(b)(6). For an explanation of this complex provision, see H.R. Rep. No. 2237, 89th Cong., 2d Sess., p. 81 (1966).

those affected by the growth of CATV, it is for the Congress and not for the courts to prescribe the detailed provisions that are necessary.

V

Private Damage, Public Policy and Prematurity

The arguments presented to this Court by petitioner are deeply rooted in pleas for public policy as a "decisive" basis for decision (Br. p. 60). In part, this aspect of petitioner's argument is pitched upon the claim that, as a practical matter, it would be too difficult for CATV systems to secure licenses. It is hard to put any stock in an assertion that the copyright proprietor's interests should be sacrificed because of the method in which the CATV systems do business. And that is all this contention amounts to, for the absence of a practical system of securing copyright licenses is due solely to the fact that the CATV systems have attempted to escape liability. As the development of copyright licensing in the broadcasting industry shows (*supra*, p. 19), workable means for securing clearances for the innumerable copyrighted works used in this complex industry have been devised. There is certainly no reason to assume that similar means will not be established with respect to CATV when it is willing to pay fair license fees.

There remains, to be sure, the question of past damages that was heavily stressed in the petition for certiorari (although not in petitioner's brief) and by The National Cable Television Association, Inc., and that is adverted to by the Solicitor General. In its most extravagant form, the claim is that the CATV industry may be mortally injured by the assessment of damages.[92] To this fear there are two answers, one historical and the other judicial.

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[92] The petition for writ of certiorari emphasized that damages for past violations threatened ruin to 1700 CATV systems (pp. 24-25), but peti-

The historical answer is amply persuasive but is not conclusive. The existence of copyright liability has not put out of business any of the many broadcast stations, or for that matter the restaurants, bars, high school dramatic clubs, and similarly positioned small users. The copyright owners, and the associations and agents through which the industry operates, want royalties from going concerns, not extinction of their customers. So far as concerns CATV itself, it has produced only two suits for damages, this and one other.[93] A number of major owners of the copyrights infringed by CATV in the fall of 1967 formally assured the Chairman of the Senate Committee that, despite the running of the three-year statute of limitations (17 U.S.C. 115(b)), they would refrain from instituting legal action while negotiations for settlement or for legislation were in progress.[94] We can for ourselves be sure that a tolerance so striking will not be converted into intransigent and self-defeating vengeance by a decision of this Court, but we cannot prove that it will not be. We turn, accordingly, to the judicial protection which can we believe be proved.

The predictions of the demise of CATV in the wake of a decision affirming the Second Circuit's judgment are based upon the assumption that the $250 "minimum" for each "infringement" provided for in Section 101(b) of the Copyright Act would be the absolute floor for damages.

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tioner's brief on the merits omits that claim. The National Cable Television Association, Inc., as *amicus curiae*, emerges from an arithmetic exercise with the conclusion of $1 million a month liability for each CATV system (p. 20 n. 36). The Solicitor General finds merit in his "implied in law" middle ground because it "would substantially lighten the burden" of past infringements, but yet is troubled that the matter would remain partially unsolved (p. 17).

[93] *Columbia Broadcasting System, Inc.* v. *TelePrompter Corp.*, 251 F. Supp. 302 (S.D. N.Y. 1965), apparently being held pending decision of this case.

[94] 113 Cong. Rec. S 14067, (daily ed. Oct. 3, 1967).

While the issue of damages has been reserved for trial and decision at this stage would in that view be premature, the suggestions that the problem of damages should bear heavily on the issue of infringement cannot be countered without some discussion of the law of copyright remedies. This is particularly the case since some commentators suggest, without any very close analysis, that the statutory minimum should govern in every case.[95] This assumption is, in our view, incorrect. We believe rather that the Act confers full discretion upon the district court to reach a result which is just in all the circumstances.

Section 101(b) on its face gives to the court a discretionary choice between "such damages as the copyright proprietor may have suffered * * * or in lieu of actual damages and profits, such damages as to the court shall appear to be just," with the statutory maximum and minimum to govern such allowance of just damages.[96] This is made especially plain when § 101(b) is compared with its predecessor, Rev. Stat. 4966, which gave the court no such discretionary choice.[97]

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[95] See, *e.g.*, Nimmer, *Copyrights* (1966) § 154.11.

[96] Section 101 of the Copyright Act provides in relevant part:

> If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:
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> (a) Injunction.—To an injunction restraining such infringement;
>
> (b) Damages and profits; amount; other remedies.—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement * * * or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated * * * [specific types of infringements and amounts set out], and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty * * *.

[97] Rev. Stat. 4966, as amended, 29 Stat. 481 (1897), provided:

> Any person publicly performing * * * any dramatic or musical composition for which a copyright has been obtained, without the

The earlier decisions of this Court under § 101(b) are not very clear in this regard.[98] But the most recent decision of this Court makes it plain enough that the district court has a discretionary choice between actual damages or profit and the statutory range. In *Woolworth Co.* v. *Contemporary Arts*, 344 U.S. 228, 231, 234 (1952), the Court said:

> • • • [T]he statute has been interpreted to vest in the trial court broad discretion to determine whether it is more just to allow a recovery based on calculation of actual damages and profits, as found from evidence, or one based on a necessarily somewhat arbitrary estimate within the limits permitted by the Act.
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> We think that the statute empowers the trial court in its sound exercise of judicial discretion to determine whether on all the facts a recovery upon profits and damages or one estimated within the statutory limits is more just.

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consent of the proprietor • • • shall be liable in damages therefor, such damages *in all cases* to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court shall appear to be just • • •. [Emphasis added.]

[98] *Westerman Co.* v. *Dispatch Co.*, 249 U.S. 100, 106-107 (1919), held that it was error to allow damages less than the statutory minimum when the amount of actual damages could not be proved:

> "Within these [statutory] limitations the court's discretion and sense of justice are controlling, but it has no discretion *when proceeding under this provision* to go outside them." (Emphasis supplied.)

Jewell-LaSalle Realty Co. v. *Buck*, 283 U.S. 202 (1931), arose upon a certified question and simply held that the statutory damage minimum was binding where there was "no proof of actual damages"; we take it that this meant no proof of the amount of the actual damages, since the decision could hardly have been so cursory had there been proof that no damages accrued. *Douglas* v. *Cunningham*, 294 U.S. 207 (1935), is no more rewarding on this issue. It held that the court of appeals could not reverse the discretion of the district judge who chose to apply the $5,000 maximum allowed by the statutory range.

The lower courts, in applying the statutory formula, have frequently expressly recognized that they were doing so in the exercise of their discretion;[99] and where the issue has arisen a number of courts have declined to award statutory damages where it is established that there were no actual damages or profits or that actual damages or profits were lower. *Shapiro, Bernstein & Co.* v. *4636 S. Vermont Ave., Inc.*, 367 F. 2d 236, 242 (9th Cir. 1966); *Washington Pub. Co.* v. *Pearson*, 140 F. 2d 465, 466 (D.C. Cir. 1944); *Davilla* v. *Brunswick-Balke Collender Co.*, 94 F. 2d 567, 568-70 (2d Cir. 1935) *cert. denied*, 304 U.S. 572 (1938); *Turner & Dahnken* v. *Crowley*, 252 F.2d 749, 752-754 (9th Cir., 1918); *F. A. Mills* v. *Standard Music Roll Co.*, 223 Fed. 849, 852 (D.N.J. 1915); *cf. Woodman* v. *Lydiard-Peterson Co.*, 192 Fed. 67, 71 (D. Minn. 1912), *aff'd*, 204 Fed. 921 (8th Cir. 1913). Moreover, in the related fields of trademark infringement and unfair competition the courts have frequently refused to order an accounting or to award damages when the issuance of an injunction "will satisfy the substantial equities of the case."[100]

The accounting provisions of Section 101(b) impose no greater bar to an enlightened discretion of the trial court

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[99] *Toksvig* v. *Bruce Pub. Co.*, 181 F. 2d 664, 667 (7th Cir. 1950); *Shapiro, Bernstein & Co.* v. *Bleeker*, 224 F. Supp. 595 (D. Cal. 1963), *aff'd*, 367 F. 2d 236 (9th Cir. 1966); *Advisers, Inc.* v. *Wiesen-Hart, Inc.*, 161 F. Supp. 831, 834 (D. Ohio 1958), *vacated on other grounds*, 238 F. 2d 706 (6th Cir. 1956), *cert. denied*, 353 U.S. 949 (1957); *Burndy Engineering Co.* v. *Sheldon Service Corp.*, 39 F. Supp. 274, 275 (E.D. N.Y. 1941), *aff'd* 127 F. 2d 661 (2d Cir. 1942). The most striking of these cases is *American Visuals Corp.* v. *Holland*, 261 F. 2d 652, 655 (2d Cir. 1958), where the infringer's profits exceeded $7,395 but the trial judge effected a lower damage award by applying statutory damages in lieu of profits. The Court of Appeals said, "he [the trial judge] chose to grant the lesser statutory amount as he had discretion to do. *F. W. Woolworth* • • •."

[100] *Champion Plug Co.* v. *Sanders*, 331 U.S. 125, 131-32 (1947); *Straus* v. *Notaseme Co.*, 240 U.S. 179, 181-183 (1916); *Taussig* v. *Wellington Fund, Inc.*, 313 F. 2d 472 (3d Cir. 1963), *cert. denied*, 374 U.S. 806; *National Van Lines* v. *Dean*, 237 F. 2d 688, 694 (9th Cir. 1956); *Square D. Company* v. *Sorenson*, 224 F. 2d 61, 65-66 (7th Cir. 1955).

than do the damage provisions. Accounting is an equitable remedy, and is designed "to prevent an unjust enrichment by allowing injured complainants to claim 'that which, *ex aeque et bono,* is theirs, and nothing beyond this.'" *Sheldon* v. *Metro-Goldwyn Corp.,* 309 U.S. 390, 399 (1940). Where there is an accounting, a defendant CATV system would not be accountable for all profits, but only for those attributable to the particular programs the copyright owner showed had been infringed. Thus, in *Shapiro, Bernstein & Co.* v. *4636 S. Vermont Ave., Inc.,* 367 F. 2d 236, 239, 241 (9th Cir. 1966), the court allowed plaintiff, who owned the copyright on 12 songs in a 1,000 song book, 12/1000 of the profit.

It may also be noted, if only for the sake of perspective, that even if the CATV system were fully accountable for profits for every infringing program, the resulting liability would be modest when compared to the program costs of the broadcast industry. Using the data presented to this Court by the CATV trade association [101] the profit of the typical CATV system attributable to any single program seems to be in the neighborhood of 25 cents.[102] Even in the wildly improbable case that every copyright owner sued this typical CATV system for every infringement, the result would be a recovery of about $13,000 per year.[103] This is about 22% of the annual revenue of this typical station, and

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[101] Brief for *National Cable Television Association, Inc., Amicus Curiae,* in this case.

[102] The representative CATV system is described as having 1,000 subscribers and revenues of $60,000 a year (p. 18), broadcasting 1500 programs a week of which 2/3 are copyrighted (p. 20). The gross revenue, on these data, is 77 cents per program. If profit is 57% before depreciation, interest and taxes (*supra,* p. 24) net after-tax profit might be in the neighborhood of 30%, or 23 cents per program.

[103] 25 cents x 1000 x 52.

contrasts with the 49% of all revenue paid for program procurement by the broadcast industry (*supra*, p. 21).

Finally, the copyright owner's remedy of injunction cannot, of course, be used to work unreasonable oppression of a CATV system. "[I]t is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all * * * whose interests the injunction may affect." *Inland Steel Co.* v. *United States*, 306 U.S. 153, 157 (1939); *Yakus* v. *United States*, 321 U.S. 414, 440 (1944); *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528, 532 (1960). If any copyright owner should out of malice or for reasons of oppression seek to enjoin CATV retransmission, the district judge cannot be expected to lend the powers of an equity court to such an abuse of copyright.

In sum, the district court has a discretion both to choose between actual and statutory damages, whether or not to allow an accounting, and the terms of an injunction. Given that broad discretion, the question of the consequences of the Second Circuit's determination respecting "public performance" can with confidence be entrusted to the lower courts.

As we have indicated (*supra*, pp. 25-29), the types of CATV systems, in terms of their impact upon copyright proprietors, are diverse, so that the judgments in infringement suits would likely be diverse. A claim against a local CATV system that merely distributes programs within the market area of the station to which the copyright proprietor has given a license is almost certain to be treated differently than a claim against a CATV system that had imported valuable copyrighted programs into markets where a license had been given to the local station. Indeed, as to the former type of situation, which petitioner contends is present in the case at bar, petitioner insists that upon trial it will demon-

strate that there were no damages at all.[104] In other cases, such as CATV service of unserved areas, a court might find that the copyright owner had lost the royalty or license fee which should have been paid him but had lost no profitable marketing opportunity otherwise open to him.

Finally, facts relevant to the defenses of estoppel and laches, which are reserved for trial in the case at bar, may be introduced in mitigation in appropriate circumstances. Suppose, for example, as will surely be contended in many cases, that the copyright proprietor knew when he licensed his program to the broadcast station that the station was used as a source of retransmission by a CATV system and made no reservation of his rights; that he knew also that, absent any demand by the copyright owner, the CATV system could be expected to retransmit the program; and that he took no action, either specific or general, to assert his rights or to demand that the infringement cease. If such facts were proved it is difficult to believe that a judge, in the exercise of his discretion, would award a crippling judgment against the CATV system.

There is, in short, an almost infinite variety of factual circumstances that will be relevant in any future copyright damage litigation involving CATV. Since the district judges are, as we have shown, free to exercise their good sense, they may be expected to carve out a flexible and *ad hoc* "middle ground" which, being rooted in facts, will be far more desirable than the abstract implied license of

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[104] Briefly summarized, petitioner's offer of proof (Br. pp. 90-94) was that respondent had been fully compensated by the broadcast stations for petitioner's retransmissions because (1) the broadcast stations knowingly sought, and received, additional advertising revenue based upon the expanded coverage supplied by the CATV systems and (2) they were therefore willing to, and did, pay license fees to plaintiff that reflected fully the value of having the copyrighted programs transmitted to the CATV subscribers. While the Court of Appeals thought this "debatable" (J.A. 1360), the point is that it is open for trial, and that if petitioner is taken at its word there were no damages at all.

considerable complexity which the Solicitor General would have this Court create in advance of trial of the relevant issues in order to deal with facts that cannot be known before that trial.

CONCLUSION

For the reasons given in the foregoing pages, the decision below should be affirmed.

Respectfully submitted,

WARNER W. GARDNER
WILLIAM H. DEMPSEY, JR.
RICHARD M. SHARP
734 15th Street, N.W.
Washington, D.C.

DOUGLAS A. ANELLO
General Counsel
National Association of Broadcasters
1812 K Street, N.W.
Washington, D.C.
Attorneys for the National Association of Broadcasters

Of Counsel:
SHEA & GARDNER
734 15th Street, N.W.
Washington, D.C.

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